HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Reference No. 1/2002

WITH

Criminal Appeal No. 118/2002

1. Rajesh Sharma
   S/o Parmanand Sharma
   R/o Bhiwari, P.S. Bhiwari
   Haryana

2. Navin Sharma S/o Parmanand Sharma
   R/o Bhiwari
   P.S. Bhiwari, District Haryana ……Appellants

Versus

State of Uttaranchal ……..Respondent

WITH

Criminal Appeal No. 122/2002

1. Gulzar Khan alias Pappu
   S/o Sri Gulam Khan
   R/o Line No. 10, Haldwani,
   P.S. Haldwani, District Nainital

2. Nisar Khan alias Guddu
   S/o Sri Gulam Khan
   R/o Line No. 10, Haldwani,
   P.S. Haldwani, District Nainital

3. Bhura alias Shakil
   S/o Mohd. Isriel,
   R/o Kidwai Nagar
   Haldwani, District Nainital ……. Appellants

Vs.

State of Uttaranchal …….Respondent

WITH

Government Appeal No.101 of 2002

State of Uttaranchal ……. Petitioner

Versus

1. Nisar Khan @ Guddu
2. Gulzar Khan @ Pappu
3. Bhura @ Shakil …….Respondents

Sri Nagendra Mohan, Sri Mahavir Singh learned counsel for the appellant and Sri R.S. Sammal learned Amicus Curiae.
Sri D.K. Sharma learned G.A.

Coram :- Hon'ble Irshad Hussain, J.
Hon'ble J.C.S. Rawat, J.

Dated :- 5th August, 2004

ORAL JUDGMENT (Per :- Hon'ble Justice J. C. S. Rawat)

Appellants – Nisar Khan alias Guddu, Gulzar Khan alias Pappu, Bhura alias Shakil, Rajesh Sharma and Navin Sharma, alt the five, were convicted under sections 148, 302 read with 149 IPC and also under section 25 Arms Act, Each of them were sentenced to undergo RI for three years under section 148 IPC and RI for three years under section 25 Arms Act with fine of Rs. 1000/- Appellants – Nisar Khan alias Guddu, Gulzar Khan alias Pappu and Bhura alias Shakil were sentenced to undergo life imprisonment under section 302 read with 149 IPC and fine of Rs. 10,000/- Appellants Navin Sharma and Rajesh Sharma were sentenced to death under section 302 read with section 149 IPC. It was further directed that all the sentences would run concurrently.

2. A Government appeal has also been preferred against the judgment and order dated 9.5.2002 passed by the learned Sessions Judge, Nainital in S.T. No.96/2000 whereby the accused Nisar Khan alias Guddu, Gulzar Khan alias Pappu and Bhura alias Shakil were sentenced to life imprisonment. This Government Appeal has been filed for enhancement of the sentence against the said accused under section 302 read with 149 IPC form life imprisonment to death sentence.

3. The learned Sessions Judge who passed the impugned judgment and order has also made a reference for confirmation of death sentence against the appellants, namely Navin Sharma and Rajesh Sharma.

4. The facts of the case are that on 11.12.1999 at about 7:15 PM, Juned Alam (deceased-1) alongwith his partners Ishrat Ali (deceased-3), Mohammad Islam (deceased-4) and their workers Khalil (deceased-5) and Aslam (decease-2) were sitting in their office near Gaula Gate Purani Chorgalia Road, P.S. Haldwani and were doing their daily accounting

relating to their business. At that time there was electric light inside and outside the office room. When the complainant Shoeb Alam (PW1) - brother of the deceased Juned Alam was alongwith Naeem Babu (PW4) taking tea to the office, a black Fiat N.E. Car No. DL-3-CB/0888 came and stopped outside the office. Appellants-Nisar Khan, Gulzar Khan, Bhura, Rajesh Sharma and Nivin Sharma armed with revolver, mousers and countrymade pistols stepped out form the car and entered in the aforesaid officer and started firing indiscriminately with the intention to kill Juned Alam and all those sitting with him in the office at that time. On alarm being raised and on hearing the noise of firing, few others came towards the scene of occurrence. All the above appellants then came out to escape form there. When car failed to start they started running towards the Gaula river. On being chased, the appellants ran away firing shots towards the witnesses. Juned Alam (deceased-1) and Aslam (deceased-2) died on the spot while Mohammad Islam (deceased-4) and Khalil (deceased-5) were taken to Haldwani hospital where they also succumbed to their injuries. Ishrat Ali (deceased-3) was referred to Bairelly but he also breathed his last on way to Bareilly.

5. On 11.12.1999 at 8:30 PM, the written F.I.R. (Ex.A1) was given at police station Haldwani by Shoeb Alam Chisti (PW-1). Then the case was registered against al the five appellants and investigation was taken up by S.H.O. Rajiv Kumar (PW-10). Inquest report (Ex.A9) of dead body of Ishrat, inquest report (Ex.A-10) of dead body of Islam, inquest report (Ex.A11) of dead body of Khalil, inquest repot (Ex.A34) of dead body of Aslam and inquest report (Ex.A35) of dead body Juned Alm were prepared on the same day at 22:00 hours onwards. The dead bodies of the all the five person were sent for autopsy to S.S.J. Base Hospital, Haldwani and the postmortem was conducted by Dr. R. A. Kedia (PW-3) on 12.12.1999. The postmortem reports are Ex.ka.2 to Ka.6.

6. The appellants – Nisar Khan and Bhura were arrested on 17.12.1999. At the instance of arrested appellants, namely Nisar Khan and Bhura, S.H.O. Rajiv Kumar (PW-1) alongwith the police party proceeded towards the bridge of Gaula River where on the pointing of appellant Nisar Khan, after removing the *"Reta, Bajri and stones",* a

pistol .12 bore and 3 live cartridges wrapped in a paper and on the pointing of appellant-Bhura alias Shakil one pistol 315 bore with two live cartridges wrapped in a paper were recovered on 17.12.1999. Recovery memo (Ex.A.7) was then prepared at the spot. S.H.O. came back to the police station at about 18:30 hours and a check FIR (Ex.A24) was prepared and register a case under section 25 Arms Act separately against the said two appellants-Nisar Khan and Bhura.

7. Remaining three appellants-Gulzar Khan, Rajesh Sharma and Navin Sharma were arrested on 22.12.1999 at the instance of the said appellants, the Inspector Rajiv Kumar (PW1)) alongwith other police personnel proceeded towards Gaula river where on the pointing of the appellant Gulzar Khan alias Puppu, after removing *"Reta, Bajri",* from near the bushes a pistol 12 bore and one live cartridge was recovered. At the instance of accused Navin Sharam a countrymade pistol .32 bore was recovered form a nearby place. In the weapon magazine one live cartridge and remaining six empty cartridges were found. At the instance of Rajesh Sharma, one countrymade pistol 324 bor4e and one empty cartridge was recovered. All the above weapons were sealed on the spot and recovery memo (Ex.A8) was prepared. At 18:25 hours, FIR (Ex.A26) was lodged against the above three appellants and three separate cases under section 25 Arms Act were registered against them.

8. The other part of the investigation taken up as usual culminated in submission of the chargesheets against the five accused-appellants under sections 147, 148 149, 307, 302, 504, 506/34 IPC and under section 25 Arms Act.

9. The charges were framed by the learned Sessions Judge against the appellants namely Nisar Khan, Gulzar Khan, Bhura, Rajesh Sharma and Navin Sharma under sections 148, 302/149 and 307/149 and 25 Arms Act. The appellants pleaded not guilty and claimed the trial.

10. In order to prove its case, the prosecution examined fourteen witnesses. Out of these, the complainant-Shoeb Alam Chisti (PW1) and

Mohammad Arif (PW2) were the eyewitnesses of the occurrence and they narrated the prosecution story.

11. Dr. R. A. Kedia (PW3) was the medical officer who conducted the postmortem examination of al the five deceased. Postmortem examination of **Juned Alam (deceased-1)** was conducted at 9 AM and the report (Ex.A6) was prepared. The following ante mortem injuries were detected:-

(i) Fire arm wound of entrance 3.5 cm x 4 cm X oral cavity deep at left cheek, lacerated surrounding skin scorched blackening tattooed. Exit wound 16cm x 18cm X oral cavity deep, margins everted at the right side of the fact involving frontal including right eye, right temporal parishial, right upper jaw and right side of brain lacerated and torn at places. 4 pellets recovered from jaw and right side of c ranial cavity.

(ii) Fire arm wound of entrance 4cm x 2 cm X thoracic cavity deep at left side of inter scapular region on back. 1.5cm lateral to middle line. Margins inverted. Blackening tattooing present around the wound. Wound of exit 2.5cm x 2cm just below the costal margin at ant. Axallery line on left side of upper part of abdomen. Left lung lacerated. Left thoracic cavity filled with 1-1.5litre of blood mixed fluid.

(iii) Fire arm wound of entrance 4cm x 1.5cm X thoracic cavity deep, margins inverted at right side of inter scapular region, 0.5cm lateral to spinal cord (vertebral column). Blackening and tattoing present. Wound of exit 2cm x 2cm, 2cm medical to right nipple, margins irregular and lacerated right lung, lever lacerated, about one litre of blood mixed fluid present on right thoracic cavity. ½ litre of blood mixed fluid present in abdominal cavity.

(iv) Fire arm wound of entrance 0.5cm x 0.5 cm thoracic cavity deep on right interscapular area, 6cm lateral to vertebral column, margins inverted, blackening and tattooing present. Wound of exit 2cm x 2.5cm, 1cm just below the middle end of clavical (right) upper part of right lung lacerated.

(v) Incised wound 4cm x 0.5cm x muscle deep at lumber region (right), 6cm lateral vertebral colour. Lying obliquely.

(vi) Incised wound 5cm x 0.5cm x muscle deep at left infra scapular region, 7cm lateral to vertebral colour, lying obliquely.

The opinion of the Medical Officer with regard to the internal examination was that both the chambers of the heart were empty and semi digested food & gases were present in the stomach and the small intestine. In the opinion of Dr. R. A. Kedia (PW3), the cause of death was shock and haemorrhage resulting form the ante-mortem injuries about 12 hours ago. He also proved the postmortem report (Ex.A-6).

12. The medical officer conducted the postmortem of the dead body of **Aslam (deceased-2)** on 12.12.1999. The following ante-mortem injuries were found on the dead body of Aslam:-

(i) Fire arm wound of entrance 1cm x 1cm thoracic cavity deep, margins inverted, blackening tattooing present at left lateral side of the lower part of neck. Wound of exit 6cm x 4cm at lateral part of right scapular region near shoulder, margins everted, right lung at upper part lacerated unto pieces and right thoracic cavity filed with blood mixed fluid. 2 bullets recovered from clothes adjacent to wound of exit.

13. The opinion of the medical officer with regard to the internal examination was that both the chambers of the heart were empty and semi digested food was present in the stomach. In the opinion of the medical

officer, cause of death was shock and haemorrhage resulting from the ante-mortem injuries about 12 hours ago.

14. Dr. R. A. Kedia-Medical Officer conducted the postmortem of the dead body of **Mohammad Islam (deceased-4)**. The following ante-mortem injuries were found on the dead body:-

(i) Fire arm wound of entrance 2.5 x 2cm abdominal cavity deep at lower back lying at mid line, 25cm below C.T. vertebra, blackening tattooing present alongwith the multiples small rounder contusions around wound of entrance. On exploring the wound 17 pellets and one wad (a small rounded piece of non-metallic disc) recovered from omental fat, spleen and adjoining tissue, spleen lacerated into pieces, multiple penetrating wound at small intestine and kidneys, about 2-2.5 litre of blood mixed fluid present inside abdominal cavity.

(ii) Fire arm wound of entrance at nose bridge in between both eye brows 4cm x 2cm x cranical cavity deep, margins inverted, blackening and tattooing present, frontal nosal bone fractured into pieces, brain matter lacerated at places and large haematomas present at places. Right eye lid haematoma with right black eye present.

(iii) Fire arm wound of entrance 1cm x 1cm x thoracic cavity deep at lateral side of left scapular region, 17cm left lateral to vertebral column, blackening and tattooing present, margins inverted. On further exploring the wound left lung found lacerated and punctured at places and about one litre of blood mixed with fluid present on the left thoracic cavity.

(iv) Lacerated wound 6cm x 2cm x muscle deep at upper part of neck near chin.

(v) Four small incised wounds 2cm x 0.5cm, 2.5cm x 0.5cm, 2.5 x 0.5cm and 2cm x 1cm all bone deep at right hip region.

(vi) Incised wounds 4.05 cm x scalp deep and 3cm x 0.5cm x scalp deep on the right of the scalp near vertex.

(vii) Incised wound 5cm x 1cm x scalp deep at left side of scalp near vertex.

15. The opinion of the medical officer with regard to the internal examination was that both the chambers of heart were empty. There was semi digested food in the stomach. In the opinion of the medical officer, the death was caused due to shock and haemorrhage resulting from the ante-mortem injuries.

16. Dr. R. A. Kedia –Medical Officer conducted the postmortem report (Ex.A4) of the dead body of **Khalil(deceased-5)** on 12.12.1999 at 11:45AM. The following ante-mortem injuries were detected:-

(i) Fire arm wound of entrance 2cm x 2cm x left thoracic and abdominal cavity deep, margins inverted, blackening and tattooing present. Circular shape wound lying at left lateral side of the body, 30 cms below the axilla. On further exploring the wound small intestine found punctured at places. Pellets found in omental fat and spleen. Spleen lacerated at places. Heart and left lung lacerated at places. Left thoracic and abdominal cavity filled with 2 – 2.5 liters of blood mixed fluid. 9 pellets and one wad (small non-metallic disk) recovered.

(ii) Incised wound 6cm x 4cm x bone deep at right side of face in semi circle shape, 2cm right lateral to nose.

(iii) Incised wound 5cm x 0.5cm x scalp deep on left side of scalp 8cm above left pinna and 10 cms above left eye brow.

17. The opinion of the medical officer with regard to the internal examination was that both the chambers of heart were empty. 100 M.L. of semi-digested food was present. In the opinion of the medical officer, the cause of death was shock and haemorrhage resulting from the ante-mortem injuries about 12 hours ago.

18 The same Medical Officer conduced the postmortem report (Ex.A3) of the dead body of the **Israt Ali (deceased-3)** at 12:30 PM on

12.12.1999. The following ante-mortem injuries on the dead body of Ishrat Ali were detected:-

(i) Fire arm wound of entrance 1cm x 1cm x cranial cavity deep, circular at left side of scalp at vertex, 8cm above the left pinna, 10 cm above the left eye brow. On exploring further meninges and brain matter found lacerated, gross haematoma about 250 M.L. of blood present in cranial cavity, base of the brain and also scalp base pierced into oral cavity and one bullet recovered from oral cavity and one bullet recovered from oral cavity at soft plato.

(ii) Fire arm wound of entrance 0.5cm x 0.5cm x left thoracic cavity deep circular in shape, blackening and tattooing present, at lower part of back a left infra scapular region, 0.5cm left lateral to vertebral column, on exploring the wound further lower part of left lung found pierced and about 1.5 litre of blood mixed fluid present in left thoracic cavity.

(iii) Fire arm wound of entrance 0.5cm x 0.5cm x right thoracic cavity deep, circular in shape, at right scapular region 6 cm lateral to vertebral column and 8 cm below the upper border of shoulder, tattooing and blackening present. On exploration further right lung found lacerated at places and about one litre of blood mixed fluid present in right thoracic cavity.

19. The opinion of the Medical Officer with regard to the internal examination was that both the sides of heart were found empty. Semi digested food was found in the stomach. In the opinion of the medical officer, the cause of death was shock and haemorrhage resulting from the ante-mortem injuries about 12 hours ago.

20. Naeem Babu (PW4) was also the eyewitness of the occurrence. He was declared hostile by the prosecution as he did not support the prosecution case. S.I. Surendra Singh Kushwaha (PW5) proved the factum of recovery of arms from the appellants-Gulzar Khan, Rajesh Sharma and Navin Sharma under section 27 of the Indian Evidence Act. S.I. R.L. Gangwar (PW6) proved the panchanama of the deceased Ishrat Ali (Ex.ka.9), Mohammad Islam (Ex.ka.10) and Khalil (Ex.ka.11). The

prosecution also examined the constable Tarun Pratap (PW-7). He took are three dead bodies to Soban Singh Jina Base Hospital, Haldwani for postmortem examination . Head constable Mahesh Chandra (PW8) prepared check FIR (Ex.A21) of the incident. He also proved the G.D. report, Ex.A-22. Constable Rajendra Prasad (PW-9) prepared check FIR under section 25 of the Arms Act on 17.12.1999 against the appellants Gulzar Khan, Rajesh Sharma and Navin Sharma. He also proved the G.D. report, Ex.ka.27. S.H.O. Rajiv Kumar (PW-10) was the investigating officer who submitted the chargesheet. K.K. Verma (PW-11) prepared panchayatnama of the dead bodies of Juned Alam and Aslam. S.I. Mohd. Zahir Khan (PW-12) investigated the case under the Arms Act against the appellants Gulzar Khan, Rajesh Sharma and Navin Sharma and submitted chargesheets Ex.A47, Ex.A49, Ex.A48. S.I. Rakesh Singh (PW-13) investigated the case under the Arms Act against the accused-appellants Nisar Khan alias Guddu and Bhura alias Shakil and submitted the chargesheets Ex.A53 and Ex.A.54. S.I. Shyam Lal (PW-14) prepared the site plan (Ex.A57) of the scene of the occurrence on the instruction of S.I. Surendra Singh Kushwaha.

21. The appellants-Nisar Khan, Gulzar khan and Bhura had denied their presence at the place of incident. All the five appellants stated that they were falsely implicated in the case. They further stated that the statements of Shoeb Alam Chisti (PW-1) and Mohammad Arif (PW-2) recorded on 7.1.2002 after their recall for further cross-examination was correct and other evidence was false. The appellants-Nisar Khan alias Guddu and Gulzar Khan alias Pappu had also stated that they used to do the business of “Reta-Bazri”. On the other hand, the other three appellants-Bhura alias Shakil, Rajesh Sharma and Navin Sharma stated that they were not carrying the business of “Reta-Bazri”. All the five appellants stated that there was no light at the place of incident and they were kept in the police station for 3-4 days.

22. The defence produced in evidence Rais Babu as DW-1. He was truck driver who stated that on that ill-fated day at about 8 to 8:30PM he was carrying Reta Bazri in his truck and when he reached near the G.N. Traders he saw unknown assailants stepped out of the car and

entered in the office and stated firing indiscriminately on the persons sitting there and thereafter they came to the car and when it did not start, they started running towards Gaula river. He further stated that the assailants were of black complexion and were not tall and seem to be from 'Purbia' community. He saw the incident in the head light of the truck. He stated that the crime was committed by those unidentified persons and not by the appellants. Another defence witness Tamash Khan (DW-2) stated that he saw five-six unidentified assailants firing at the scene at that time and that they were of 18-19 years of age. He also stated that he could not identify the assailants who were not looking as muslim by their profile. The defence also produced Rajendra Singh as DW-3. He was posted in Haldwani as J.E., Electricity Department. He stated that there was no power connection in G.N. Traders, Haldwani. Mohd. Arif DW-4 stated that the written report (Ex.ka.1) was scribed by him at the instance of police of police Inspector on 12.12.1999 at about 5A.M.

23. The learned Sessions Judge on the basis of his appreciation of the evidence in the case held the appellants - Nisar khan, Gulzar Khan, Bhura, Rajesh Sharma and Navin Sharma guilty and convicted them under sections 148, 302 read with 149 IPC and also under section 25 Arms Act. They were sentenced to undergo RI for three years under section 148 IPC and RI for three years under section 25 Arms Act together with fine of Rs. 1000/-. Appellants – Nisar Khan, Gulzar Khan and Bhura were sentenced to undergo life imprisonment under section 302 read with 149 IPC and fine of Rs. 10,000/-. Appellants Navin Sharma and Rajesh Sharma were sentenced to death under section 302 read with section 149 IPC.

24. We have heard Sri Nagendra Mohan, Sri Mahavir Singh learned counsel for the appellants, Sri R.S. Sammal learned Amicus Curiae and Sri D.K. Sharma learned G.A. on behalf of the State. We have also gone through the evidence and material on record.

25. At the outset, it need to be mentioned that it is not disputed that the deceased had homicidal deaths on account of the injuries sustained by them on the date of occurrence. Dr. R.A. Kedia (PW-3) who was the

medical officer had deposed that he conducted autopsy of the dead bodies of all the five deceased namely, Mohammad Islam, Ishrat ali, Khalil, Aslam & Juned Aslam and prepared the postmortem report thereof which are Ex.ka.2 to ka.6 respectively. He stated that the deaths of all the five deceased were caused due to shock and hemorrhage resulting from the ante-mortem injuries. This fact further stand corroborated from the statement of the eye witness Shoeb Alam Chisti (PW-1), Mohammad Arif (PW-2), Rais Babu (DW-1) and Tamesh Khan (DW-2). The ocular testimony of Shoeb Alam Chisti (PW-1) and Mohammad Arif (PW-2) further stand corroborated by the evidence of defence witnesses who had stand that the deceased were shot dead on 12.12.1999 by some unidentified assailants.

26. Now, the question for consideration is : whether the appellants were responsible for the injuries sustained by the deceased persons which resulted in their death. The prosecution in support of the case produced eye witnesses Shoeb Alam Chisti (PW-1), Mohammad Arif (PW-2) and Naeem Babu (PW-4). Shoeb Alam Chisti (PW-1) had stated that on the date of occurrence he was carrying tea alongwith Naeem Babu (PW-4) for the deceased. Mohammad Arif (PW-2) had stated that on the date of occurrence he went to see Juned Alam (deceased -1) towards his office near railway crossing. Both the witnesses have further stated that there was electric light inside and outside the office when they saw a black coloured N.E. car came at the office of the deceased and stopped there. The accused persons namely, Nisar Khan, Gulzar Khan, Bhura, Rajesh Sharma and Navin Sharma came out from the car with revolver and mousers etc. They entered into the office and started firing indiscriminately with the intention to cause death of Juned Alam and all those sitting with him in the office at that time. After doing so, they came to the car when it failed to start they ran away towards the Gaula river. Naeem Babu (PW-4) was declared hostile and did not support the prosecution case.

27. Shoeb Alam Chisti (PW-1) and Mohammad Arif (PW-2) produced by the prosecution before the court and thereafter they were cross-examined by the defence counsel on 13.2.2001. Their testimony

remained intact during the cross-examination and the defence could not take out anything fatal to the prosecution form them. During the trial. Naeem Babu (PW-4) moved an application on 24.2.2001 before the learned Sessions Judge in which he alleged that he was being terrorized by the appellants. When Naeem Babu (PW-4) was examined on 22.3.2001 he did not support the prosecution version. It appear that he was terrorized by the appellants so that he may not depose against them.

28. The defence moved an application on 10.12.2001 in order to recall the witnesses Shoeb Alam Chisti (PW-1) and Mohammad Arif (PW-2) for further cross-examination on the ground that the defence has engaged a new counsel and certain questions are to be put to them with regard to the prosecution case. The application was allowed by the learned Sessions Judge and the said witnesses were cross-examined on 7.1.2002 by the defence counsel. The learned counsel for the defence put certain questions to both the witnesses and they denied that the appellants have committed the murders. On this point the prosecution sought permission for their cross-examination and the court allowed the same. Both the witnesses remained unshaken during the lengthy cross-examination on 3.2.2001 but after an interval of one year it seems that they were won over and played a trick on the court so that their testimony may help the appellants. When the prosecution confronted Shoeb Alam Chisti (PW-1) with his previous statement he remained silent. When he was asked again then the court observed that the said witness did not answer the questions asked by the prosecution and kept mum. Mohammad Arif (PW-2) was also won over by the defence. Both the witnesses after an interval of one year changed their statements.

29. In view of facts and circumstances of the case, it make out a strong probability that the said witnesses were under threat or pressure. Even otherwise it is well settled that the evidence of the hostile witnesses can also be relied to the extent it supports the prosecution version. Evidence of such witnesses cannot be treated to be washed of the record. It remain admissible in the trial and there is not legal bar to base the conviction on their testimony. The very object of taking evidence is to discover the truth as far as it is humanly possible for the court to do so. The fact,

therefore, that sound public policy requires that a party should not be permitted to malign his own witness, cannot and does not absolve the Court of its own high duty of attempting to discover the truth. Even when a witness deposes in favour of the case of the party calling him, the Court on a consideration of his evidence may either believe or disbelieve him. Even in such a case, the Court has power and duty of deciding whether or not to believe the witnesses.

30. It has been observed in Krishna Mochi Vs. State of Bihar 2002 SCC (Cri) p/1220:-

> *"It is a matter o common experience that in recent times there has been a sharp decline of ethical values in public life even in developed countries much less a developing one, like ours, where the ratio of decline in higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power. A witness may not stand the test of cross examination, which may be sometimes, because he is a bucolic person and is not able to understand the question put to him by the skilful cross-examiner and at times under the stress of cross-examination, certain answers are snatched from him. When a rustic or illiterate witness faces an astute lawyer, there is bound to be imbalance and, therefore, minor discrepancies have to be ignored. These days it is not difficult to gain over a witness by money power or giving him any other allurance or giving out threats to his life and/or property at the instance of persons, in/or close to powers and musclemen or their associates. Such instances are also not uncommon where a witness is not inclined to depose because in the prevailing social structure he wants to remain indifferent. It is most unfortunate that expert witnesses and the investigating agencies and other agencies which have an important role to play are also not immune from decline of valued in public*

Life. Their evidence sometimes becomes doubtful because they do not act sincerely, take everything in a causal manner and are not able to devote proper attention and time.

32. Thus, in a criminal trial a Prosecutor is faced with so many odds. The court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in an ivory tower. I find that in recent times the tendency to acquit an accused easily is galloping fast. It is very easy to pass an order of acquittal on the basis of minor points raised in the case by a short judgment so as to achieve the yardstick of disposal. Some discrepancy is bound to be there in each and every case which should not weigh with the court so long it does not materially affect the prosecution case. In case discrepancies pointed out are in the realm of pebbles, the court should tread upon it, but if the same are boulders, the court should not make an attempt to jump over the same. These days when crime is looming large and humanity is suffering and the society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim ***"let hundred guilty persons be acquitted, but not a single innocent be convicted" is, in practice, changing the world over and courts have been compelled to accept that "society suffers by wrong convictions and it equally suffers by wrong acquittals."*** *I find that this Court in recent times has conscientiously taken notice of these facts from time to time. In the case Inder Singh Vs. State (Delhi Admn.) reported in 1988 Supp. SCC 686; 1989 SCC (Cri) 48; AIR 1988 SC 1988 wherein it has been held that: "Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes" in the case of* ***State of U.P. Vs. Anil Singh {1988 Supp SCC 686; 1989 SCC (Cr) 48; AIR 1988 SC 1998}*** *it was held that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge had to perform.* ***In the case of State of W.B. Vs. Orilal Jaiswal {1994 (1) SCC 73; 1994 SCC (Cri) 107}*** *it was*

held that justice cannot be made sterile on the plea that it is better to let a hundred guilty escape that punish an innocent. Letting the guilty escape is not doing justice, according to law. In the case of ***Mohan Singh Vs. State of M.P****. it was held that the courts have been removing chaff from the grain. It has to disperse the suspicious cloud and dust out the smear of dust as all these things clog the very truth. So long chaff, cloud and dust remain, the criminals are clothed with his protective layer to receive the benefit of doubt. So it is a solemn duty of the courts, no to merely conclude and leave the case the moment suspicious are created. It is the onerous duty of the court, within permissible limit to find out the truth. It means, on one hand no innocent man should be punished but on the other hand to see no person committing an offence should get scot-free. If inspite of such effort suspicion is not dissolved, it remains writ at large, benefit of doubt has to be credited to the accused.*

Keeping in view the import of the reported decisions, the peculiar circumstances of the case, warrant acceptance of the evidence of the prosecution in support of its version that the appellants have fatally assaulted the victims of the case.

31. The defence produced Rais Babu (DW-1) and Tamesh Khan (DW-2). Both the witnesses alleged that they were present at the time of incident. Both stated that some unknown assailants stepped out from the car and entered into the office and started firing indiscriminately on the persons who were sitting inside the office. They denied that the assailants were the appellants but they stated that the assailants were small structured and five or six persons in numbers. After committing the murder of the deceased they went towards Gaula river.

32. The above inference is lent credence to the fact that Shoeb Alam Chisti (PW-1) who was present at the scene of the occurrence promptly reported the matter to the police station at 8:30 PM on 11.12.1999. The prompt FIR thus inspire confidence that it was not the outcome of due consultation or deliberation. FIR in a criminal case and particularly in a

murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstances in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eye witness, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. The fact that the appellants committed the murder of the deceased persons further stand corroborated by the prompt FIR in which the name of the appellants have been shown.

33. The learned counsel for the defence contended that Shoeb Alam Chisti (PW-1) was carrying teat at the time of incident. When the incident happened, the tray & glasses fell on the ground and the glasses were broken. The I.O. did not make the recovery of pieces of glasses which only indicate a remissness on the part of the investigating officer. On this basis, the appellants cannot get any benefit.

34. It was further contended that the blood stained clothes of Shoeb Alam Chisti (PW-1) were not taken into possession by the I.O. He stated that the blood stains were received on his clothes when he was taking the injured on a rickshaw. He further stated that the I.O. did not ask him to handover the clothes hence he did not do so. Failure to seize the blood stained clothes also indicate only the remissness on the part of the investigating officer and the evidence of the prosecution would not be impaired in any way.

35. In **Dhanaj Singh Alias Shera & others Vs. State of Punjab 2004 (3) SCC p/654,** it was observed by the Hon'ble Supreme Court that in the instant case, the High Court found several disturbing features which indicated how the investigating officer had made out a new case to save the accused persons and to implicate the complainant party. Hence, the High Court analysed the evidence of the eye witnesses with due care and caution. On finding the said evidence to be credible, the High Court

upheld the conviction recorded by the trial court. Before the Hon'ble Supreme Court, the accused-appellants challenged the conviction on the grounds: (i) that the police after thorough investigation had concluded that it was the complainant party which caused the death of the deceased, (ii) that the pellets, wads and cartridges were not recovered from the spot, (iii) that the weapons of assault and the pellets were not sent for ballistic examination, (iv) that the blood stained earth was not sent for chemical examination (v) that many persons who could have thrown light on the incident had not been examined, and (vi) that the evidence being that of highly interested and inimical persons, should have been discarded. Dismissing the appeal, it was held by the Hon'ble Apex Court that even if the investigation is defective, that pales into insignificance when ocular testimony is found credible and cogent. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective.

36. It has been held in Chhout Vs. State of Maharashtra 1997 CRI. L.J. 4394 (SC):-

> *"That necessarily means that all of them were the most natural and probable witnesses to an incident that then took place near his house, notwithstanding the fact that they were not residents of that locality. It also requires to be mentioned here that if the Investigating Officer failed to seize the bloodstained clothes of PWs 3 & 8 and to promptly examine PW3, whose name as nay eye witness was disclosed immediately after the incident, it only indicates remissness on his part but the evidence of PWs3 & 8 was not in any way impaired thereby."*

37. The Hon'ble Apex Court has, while maintaining the conviction of the appellant in Karnel Singh Vs. State of M.P., 1995 CRL. L. J. 4173, observed:-

> *"5. Notwithstanding our unhappiness regarding the nature of investigation, have to consider whether the evidence on record,*

even on strict scrutiny, established the guilt. In cases of defective investigation the Court has to be circumspect in evaluation the evidence but it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the Investigating Officer, if the investigation is designedly defective. Any Investigating Officer, in fairness to the prosecutrix as well as the accused, would have drawn up a proper seizure-memo in regard to the 'Chaddi'. That is the reason why we have said the investigation was slipshod and defective."

38. The learned counsel for the appellants referred to the postmortem report of Juned Alam (deceased -1) and Khalil (deceased-5) to show that they have sustained two incised wounds. Mohammad Islam (deceased-4) had sustained three incised wounds at three places. The learned counsel stated that these incised wounds belie the prosecution case. The prosecution has not alleged in its evidence that the sharp edge weapons were in the hands of any of the appellants at the time of commission of offence. Learned counsel urged that the prosecution has failed to explain as to how these wounds were caused on the person of the deceased. The learned G.A refuted the contentions of the defence. Dr. R. A. Kedia (PW-3) stated that the such type of wounds may be caused on an impact against the table or by sharp edged iron rod. The prosecution has established that there was an office of the deceased and it was natural that there were chairs and tables inside the office. When the appellants started indiscriminate firing inside the office it was natural and highly probable that the victims tried to escape and in a situation like this incised injuries were sustained by the deceased from the impact of office furniture etc. Thus the contention of the defence has no force.

39. The learned counsel for the defence contended that the F.I.R. was ante-timed. It was also contended that there were some overwriting on the report and the G.D. as to the date on which the case was registered. It is insignificant because the G.D. Ex.ka.22 clearly reveal that the case was registered on 11.12.1999 and Shoeb Alam Chisti (PW-1)- the informant

also corroborated the fact that he lodged the report on 11.12.1999 at 8:30 PM. The defence relied on the evidence of Mohammad Arif (PW-2) who is said to have scribed the report on the dictation of Shoeb Alam Chisti (PW-1) and on the basis of which check FIR was prepared. He stated that he scribed the report in the morning of 12.12.1999 at 5:00 AM. His evidence does not inspire confidence because the inquest report of Aslam and Juned Alam (Ex.ka.34 & ka.35 respectively) clearly mention the date and time of the FIR and the name of the informant-Shoeb Alam Chisti (PW-1). The inquest report of the deceased namely Ishrat Ali, Mohammad Islam and Khalil Ex.ka. 9 to Ka.11 also reveal the date and time of the FIR. It was further contended that the above inquest reports (Ex.ka.9 to ka.11) reveal that the information of the dead body was given by ward boy Govind Singh. It is insignificant because the inquest report clearly indicates the date and time of the FIR. The hospital authorities were also under legal obligation to inform the police about the dead bodies. The inquest report of the two deceased Juned Alam and Aslam clearly reveal the name of the informant. Haldwani is a small town and five murders were committed by the appellants and the entire area would be in fear and shock. The inquest report prepared under section 174 of the 'Code' is aimed at serving of statutory duty. The inquest report of Aslam (deceased-2) and Juned Alam (deceased-1) prepared at the place of incident clearly mention the name of the informant-Shoeb Alam Chisti (PW-1). The other three inquest report which were prepared at the hospital mention that the ward boy informed about the death. This fact is insignificant because the time and date of the FIR had been mentioned in the inquest report. It was merely on account of hospital death of the three victims, the arguments of the learned counsel for the defecne is therefore not tenable.

40. The learned counsel for the defence has further contended that the FIR had been received by the Magistrate on 20.12.1999. The FIR clearly reveal that it was sent by 'Dak'. It has been held in Munish Prasad Vs. State of Bihar SCC(Cri) 2002 p/175:-

> *"13 in support of the appeal, a further submissions has been made pertaining to the first information report (FIR). On this score the appellants contended that delayed receipt of FIR in the Court of the*

Chief Judicial Magistrate cannot but be viewed with suspicion. While it is true that section 157 of the Code makes it obligatory on the officer in charge of the police station to send a report of the information received to a Magistrate forthwith, but that does not mean and imply to denounce and discard an otherwise positive and trustworthy evidence on record. Technicality ought not to outweigh the course of justice – if the court is otherwise convinced and has come to a conclusion as regards the truthfulness of the prosecution case, merely delay, which can otherwise be ascribed to be reasonable, would not by itself demolish the prosecution case. The decision of this Court in Shiv Ram Vs. State of U.P. {1998(1) SCC 149; 1998 SCC (Cri) 278} lends support to the observation as above.

14. This Court further in State of Karnataka Vs. Moin Patel {1996(8) SCC 167; 1996 SCC (Cri) 632; AIR 1996 SC 3041} stated vis-à-vis the issue of delay in dispatch of FIR as below:-

16. The matter can be viewed from another angle also. It also already been found by us that the prosecution case that the FIR was promptly lodged at or about 1:30 am and that the investigation started on the basis thereof is wholly reliable and acceptable. Judge in the context of the above facts the mere delay in dispatch of the FIR – and for that matter in receipt thereof by the Magistrate – would not make the prosecution case suspect for as has been pointed out by a three-Judge Bench of this Court in Pala Singh Vs. State of Punjab, the relevant provision contained in section 157 Cr. PC regarding forthwith dispatch of the report (FIR) is really designed to keep the Magistrate informed of the investigation of a cognizable offence so as to be able to control the investigation and if necessary to give proper direction under section 159 Cr. PC and therefore if in a given case it is found that FIR was recorded without delay and the investigation started on that FIR then however improper or objectionable the delayed receipt of the report by the Magistrate concerned may be, it cannot by itself justify the conclusion that the investigation was tainted and the prosecution unsupportable.

In view of the foregoing reasons, the contention of the learned counsel for the defence is devoid of merit.

41. The learned counsel for the defence further contended that Mohammad Arif (PW-2) was a chance witness as he was the resident of Mohala Khalsa, Kashipur, District Udham Singh Nagar. The learned G.A. refuted the contention. It had been contended that at the time of the incident he was going towards the railway crossing near the place of incident and he was in Haldwani only to meet his relative. Shoeb Alam Chisti (PW-1) stated during the cross-examination that he saw Mohammad Arif (PW-2) to be present at the place of incident. Thus, the presence of Mohammad Arif (PW-2) at the spot is not doubtful. It was further contended that his name was not in the FIR and his name was subsequently introduced by the prosecution in its evidence. It is not necessary that the names of all the eyewitnesses must be incorporated in the FIR. The Hon'ble Apex Court has held in Bhagwan Singh and other Vs. State of M.P. 2002 SCC (CRI) p/736:-

> *"13. We also do not find any substance in the submission of the learned counsel for the appellants that statement of Kiran (PW7) should not be given any weight because her name is not mentioned in the FIR. There is no requirement of law for mentioning the names of all the witnesses in the FIR, the object of which is only to set the criminal law in motion. Kiran PW7 herself was injured and being the niece of Hari Ram (deceased), had no reason to involve innocent persons in the commission of the crime. Merely because PWs 7, 12 and 22 happen to be the relation of the deceased, cannot be made a ground to discard their evidence. In the circumstances of the case, the High Court has rightly found the aforesaid witnesses to be natural witnesses of the occurrence."*

Thus the contention of the learned counsel for the appellant is not tenable.

42. The learned counsel for the appellants has contended that the statement of Mohammad Arif (PW-2) was recorded after lapse of 16 days by the I.O., hence his evidence cannot be relied upon. The ocular

testimony of the witness is cogent and credible. Mere delay in recording the statement under section 161 of the Code by the I.O. does not make the evidence unbelievable. It has been held in Ramesh Vs. State of M.P. 2000 SCC (Cri) p/206:-

> *"6. ……The argument of Mr. Naik, appearing for the appellant against acceptability of witnesses 2 and 4 is that they were examined by the police under section 161 CrPC on 6.10.1985 and 4.10.1985 respectively. This delay in examining the two witnesses ipso facto cannot be a ground to discard their testimony, more so, when in the cross-examination of the witnesses, nothing tangible had been brought out to impeach their testimony. On the other hand, the evidence of PWs 2 and 4 fully corroborates the reliable evidence of PW1 and therefore, the courts below were justified in maintaining the conviction of appellant Ramesh of the charge under section 302 IPC."*

Thus, the evidence of PW-2 is credible and cogent and cannot be discarded on the above ground alone.

43. The learned counsel for the defence further contended that Shoeb Alam Chisti (PW-1) stated that on hue and cry many people came at the scene of occurrence but in evidence they have not been produced before the court although they were the independent witnesses of the case. It is not necessary to produce all the witness only to multiple the evidence of the incident on the same point. It has been held in Komal and others Vs. State of U.P. 2002 SCC (Cri) 1600:-

> *"11. Learned counsel next contended that though, according to the statements of witnesses, some villagers had arrived at the place of occurrence when the members of the prosecution party were beign assaulted and they intervened in the matter, none of them has been examined in the case on hand. In our view, non-examination of these witnesses by itself would not affect the veracity of the prosecution case when the evidence of PWs 2 and 4, the two injured eyewitnesses who had received multiple injuries, has been found to be trustworthy and their evidence is*

corroborated by the informant PW5 and supported by medical evidence as well as objective finding of the investigating officer."

44. It has also been held in Babu Ram Vs. State of U.P. 2002 SCC (Cri) p/1400:-

> *"7. It was submitted by the learned counsel for the appellants that Ram Autar, an independent eyewitnesses present at the scene of occurrence according to the prosecution case and a government servant has not been examined, and therefore, an adverse inference should be drawn against the prosecution. It is settled law that non-examination of an eyewitness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of the pen. An effort should be made at appreciating the worth of such evidence as has been adduced. If the evidence coming from the mouth of the eyewitnesses examined in the case is found to be trustworthy and worth being relied on so as to form a safe basis for recording a finding of guilt of the accused persons then non-examination of yet another witness who would have merely repeated the same story as has already been narrated by other reliable witnesses would not cause any dent or infirmity in the prosecution case. In the case at hand we additionally find from the testimony of Asharfi Lal that inspite of being a government servant and not involved in local village disputes he is afraid of deposing against the accused persons and there is substance in the submission of the learned counsel for the State that Ram Autar if tendered in the witness box would have followed the same track as was chosen by Asharfi Lal, PW3."*

45. The learned counsel for the defence submitted that there was no electric light inside and outside the place of occurrence at the time of incident. The prosecution adduced the evidence of Shoeb Alam Chisti (PW-1) and Mohammad Arif (PW-2) to the effect that there was electric light inside and outside the office of G.N. Traders – the place of occurrence. During the cross-examination, their testimony were not shaken on this point. The defence witness Rajendra Singh (DW-3) was posted at Haldwani as J.E. He stated that there was no power connection

In G.N. Traders, Haldwani at the relevant time. But he also admitted that the area in which the incident took place was not in his territorial jurisdiction and he never visited the office of G.N. Traders. He gave out that he cannot rule out the possibility of taking the electricity energy by illegal means. Thus, we are of the opinion that the evidence of Shoeb Alam Chisti (PW-1) and Mohammad Arif (PW-2) is cogent and credible and prove that there was at the time of incident electric light inside and outside of the G.N. Traders. In view of the foregoing discussion we are of the view that the prosecution has proved the case successfully against the appellant that they were armed with deadly weapons and committed the murders of the deceased.

46. Now, we have to come to the charge relating to the recovery of fire arms under section 27 of the Evidence Act on pointing of the appellants. Section 27 of the Indian Evidence Act is an exception to the general rule that a statement made before the police is not admissible in evidence. The following are the requirements or conditions for application of Section 27 of the Indian Evidence Act:-

(i) The fact must have been discovered in consequence of the informant received from the accused.

(ii) The person giving the information must be accused of an offence.

(iii) He must be in custody of a police officer.

(iv) Only that portion of the information, which relates strictly to discover can be proved. The rest is irrelevant.

(v) The discovery of fact must relate to the commission of some crime.

(vi) Before the statement is proved somebody must depose that some article was discovered in consequence of the information received from the accused.

47. The basic idea embedded in section 27 of the Evidence Act is doctrine of confirmation by subsequent events. The doctrine is found on the principle that if any fact is discovered in a search made on the strength

of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the accused that the information given by the accused is true. The information might be confessional or non-exculpatory in nature but if it results a discovery of a fact it become a reliable information. It is now well settled that recovery of an object is not discovery of a fact as envisaged in the section. The decision of Privy Council in Pulukari Kottaya Vs. Emperor (AIR 1947 PC 67) is the interpretation that the fact discovered envisaged in the section embraces the place form which the object was produced, the knowledge of the accused as to it but the information given must relate distinctly to that effect. No doubt, the information permitted to be admitted in evidence is confined to that portion of information which "distinctly relates to the fact thereby discovered. The extent of information admitted should be consistent with understands ability.

48. Keeping the above principle, we have examined the evidence relating to the discovery of the said articles on disclosure statement made by the appellants. In the case in hand, S.H.O. Rajiv Kumar (PW-10) stated that on 17.12.1999 on receiving information he proceeded with police force to arrest the appellants near Rampur By-Pass and arrested the appellants namely Nisar Khan and Bhura. On their disclosure, the police party alongwith the said appellants proceeded to the place where alleged arms were concealed. After taking each others search the police party proceeded with both above appellants Nisar Khan and Bhura towards the under-construction bridge of Gaula river where on the pointing of the said appellants, after removing the Reta, Bajri and stones, a pistol 12 bore and 3 live cartridges wrapped in a paper and on pointed of accused Bhura on pistol .315 bore with two live cartridges wrapped in a paper were recovered. On 22.12.1999 after the arrest of remaining three appellants namely, Gulzar Khan alias Pappu, Rajesh Sharma and Navin Sharma, S.I. Rajiv Kumar (PW-10) alongwith police personnel proceeded to the place where alleged weapons were concealed, on disclosure by the said appellants. After taking each others search the police party proceeded alongwith the three appellants towards Gaula river where on the pointing of the said appellants, after removing Reta, Bajri, found a pistol 12 bore and one live cartridge wrapped in a cloth was recovered. On the pointing

of appellant-Navin Sharma alleged countrymade pistol was recovered from a nearby place in which one live cartridge was also intact and remaining six empty cartridges were found. On the pointing of accused Rajesh Sharma one countrymade pistol .324 bore was recovered. One empty cartridge was in its chamber. The prosecution witness S.I. Sri Surendra Singh Kushwaha (PW-5) also corroborated the above facts.

49. Perusal of the recovery memo Ex.ka.7 & ka.8 clearly reveal that these do not contain disclosure statements. The prosecution has not proved any disclosure statement. It is the pre-condition to attract the provision of section 27 of Evidence Act that the accused give a disclosure statement and thereafter the recovery can be effected under section 27 of the Evidence Act. The recoveries have been made allegedly under the joint disclosure statement of the appellants though it was not proved. All the recoveries made from the open place i.e. from the Guala river which was easily accessible to all and sundry. It has been held in Abdul Sattar Vs. Union Territory, Chandigarh 1986 Cri. L.J. 1986 p/1073:-

> *"Recovery is said to have been made more than three weeks after the occurrence. Admittedly, the place from where these two things are said to have been recovered was a public place and appears to have been very much accessible to people of the locality. It is difficult to believe that these two had been so concealed that they were not noticed and were available to be collected from the very place such a long time after."*

In view of the foregoing reasons the countrymade pistols on the pointing of the appellants do not inspire confidence.

50. Now the question arises as to whether the prosecution has been able to prove that the appellants committed the offence by fire arms viz. the pistol, revolver and countrymade pistol. The recoveries of countrymade pistol and cartridges on the pointing of the appellants had been held unbelievable. The recoveries of arms held to be unbelievable however do not assail the prosecution version. The prosecution had adduced the evidence that all the five appellants were armed with mouser, revolver and

contrymade pistol. According to the prosecution evidence none of the conturymade pistol recovered at the instance of the appellants were sent to the Ballistic Expert. As such it is not established that the shots were fired by the fire arms recovered during the commission of offence. There is no recovery of mouser and revolver which is said to have been used in the commission of the offence. Meaning thereby the police could not recover the alleges arms by which the murders were committed. No mouser or revolver were recovered on the pointing of the appellants. Inspite of this, the ocular testimony of the witnesses of the fact is cogent and credible and prove that the murders were committed by the fire arms wielding by the appellants.

51. The learned Sessions Judge had distinguished the case of the Rajesh Sharma and Navin Sharma, both of whom have been awarded capital punishment. It has been held by the learned Sessions Judge that Rajesh Sharma and Navin Sharma belong to the state of Haryana and appear to have committed the murder like professionals and hardened criminals in Haldwani. We have gone through the record and the evidence adduced by the prosecution. There is no evidence to show the appellant Navin Sharma and Rajesh Sharma and hardened criminals and they were hired to commit the murder of the deceased persons. Both the appellants had no criminal history at all. The learned Sessions Judge under section 313 of the 'Code' had recorded the age of Navin Sharma as 22 years and that of Rajesh Sharma as 25 years.

52. The learned counsel for the defence has contended that the prosecution had produced the same set of evidence against all the appellants and no role distinct to each other was assigned to any of the appellants but learned Sessions judge awarded the extreme penalty to appellants-Navin Sharma and Rajesh Sharma which is harsh and unwarranted under law. The learned G.A. refuted the contention and further contended that the sentence of the appellants-Nisar Khan, Gulzar Khan and Bhura may be enhanced from life imprisonment to death sentence. The State had also filed an appeal to that effect.

53. It has to be considered as to whether the case falls in the category of the "rarest of the rare cases" calling for the extreme penalty of death.

No doubt, the murder committed by appellants were brutal in nature. However, the shocking nature of the crime should not induce an instinctive reaction as regards the consideration of quantum of punishment. The entire set of attending circumstances have to be taken note of to come to a judicial finding as to what punishment should be awarded to the offender. It is well settled principle of law that the Court must pay due attention both to the crime and criminal in awarding the death sentence. The due weight to be given to the aggravating and mitigating factors depends upon the facts and circumstances of a particular case.

54. Brutality is inbuilt in very murder and mitigating factors is to be seen in all cases.

55. The Supreme Court in the background of these factors indicated in Bachan Singh case {reported in 1993 (3) SCC 670} formulated the following propositions for application to the facts of each case for determination of the question:-

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment in the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment of life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and al the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in dong so the mitigating circumstances have to be accorded full weightage and a just

balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

(39). In order to apply these guidelines inter alia the following question may be asked answered:

(a) is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

56 The principles laid down in Bachan Singh case and the formulations made in Machhi Singh case {reported in 1996 (6) SCC 250} as noted earlier have been applied by the Supreme Court in different cases depending on the facts and circumstances thereof. in the case of Nirmal Singh Vs. State of Haryana {reported in 1999 (3) SCC p/650} the Supreme Court while confirming the death sentence imposed on accused Dharam Pal, commuted such sentence to life imprisonment of the co-accused taking note of the fats that the accused had no criminal antecedent, no possibility of continued threat to society, he was only accompanying his brother co-accused and gave three blows to one deceased only after his brother had given 2-3 blows to the deceased. No assault was carried out by him on other victims who were killed by his brother. The Supreme Court in the above case held that the case is not of "rarest of rare". Nature and hence commuted death sentence to life imprisonment.

57. It has been held in Anshad Vs. State of Karnataka 1994 4 SCC p/381:-

> *"The courts must be alive to the legislative changes introduced in 1973 through Section 354(3) Cr.P.C. Death sentence, being an exception to the general rule, should be awarded in the 'rarest of the rare cases' for 'special reasons' to be recorded after balancing the aggravating and the mitigating circumstances, in the facts and circumstances*

of a given case. The number of person murdered is a consideration but that is not the only consideration for imposing death penalty unless the case falls in the category of 'rarest of the rare cases'. The courts must keep in view the nature of the crime, the brutality with which it was executed, the antecedents of the criminal, the weapons used etc. It is neither possible nor desirable to catalogue all such factors and they depend upon cases to case."

58. After elaborate discussion of the law laid down earlier by the Supreme Court in Mohd. Chaman Vs. State (NCT Delhi) 2001 2 SCC (Cri) p/28 held that :

"Coming to the case in hand, the crime committed is undoubtedly serious and heinous and the conduct of the appellant is reprehensible. It reveals a dirty and perverted mind of a human being who has no control over his carnal desires. Then the question is : Whether the case can be classified as of a "rarest of rare" category justifying the severest punishment of death. Treating the case on the touchstone of the guidelines laid down in Bachan Singh, Macci Singh and other decisions and balancing the aggravating and mitigating circumstances emerging from the evidence on record, we are not persuaded to accept that the case can be appropriately called one of the "rarest of rare cases" deserving death penalty."

59. The prosecution has led the evidence that all the five appellants came out form the car and they had fire arms in their hands. They entered into the office of the deceased persons and started indiscriminate firing inside the office and committed the murder of the deceased persons. Thereafter the appellant ran away towards the Gaula river. There is no evidence that the appellants are hardened criminals and dangerous persons that to spare their life will endanger the society or community. Keeping in view the nature of the crime the manner in which it was executed, the antecedent of the appellants and the weapon used, we find it difficult to uphold the capital punishment awarded by Sessions Judge to the

appellants-Rajesh Sharma and Navin Sharma and we are not inclined to enhance the sentence of life imprisonment as awarded to the appellants-Nisar Khan, Gulzar and Bhura to extreme penalty of death sentence. We are also not satisfied that the circumstances of the crime are such that there is no alternative but to impose the death sentence even after according maximum weightage to mitigating circumstances in favour of the appellant. We are of the opinion that this is not the rarest of rare case calling the extreme penalty of death for the murder committed by the appellant. We are of the considered opinion that the case is one in which a humanist approach should be taken in the matter of awarding the punishment.

60. In view of the aforesaid reasons, the appeals filed by the five appellants are partly allowed. The conviction of the appellants as recorded per judgment and order dated 9.5.2002 under sections 148 & 302 read with 149 IPC is affirmed but they are acquitted of the charge under section 25 of the Arms Act. The sentence awarded to the appellants-Nisar Khan alias Guddu, Gulzar Khan alias Pappu and Bhura alias Shakil per judgment dated 9.5.2002 passed by the Sessions Judge, Nainital under section 148 & 302 read with 149 IPC is affirmed. The sentence of death of the appellants-Rajesh Sharma and Navin Sharma per judgment and order dated 9.5.2002 under section 302 read with section 149 IPC is , however, modified to the sentence of life imprisonment.

61. Criminal Reference No. 1/2002 made by the learned Sessions Judge is hereby rejected.

62. Government Appeal No. 101/2002 made by the State is also rejected.

63. Let the copy of the judgment alongiwth record of the case be immediately sent back to the court concerned for needful compliance under intimation to this Court within two months positively.

(J.C.S. Rawat, J.) **(Irshad Hussain, J.)**

(Rawat)